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CORPORATE POWERS.

Corporations are commonly believed to enjoy, by grant from the State, powers not enjoyed by natural persons; and this is the basis of many proposals in this age of governmental regulation and legislative activity. How far is this common belief well founded and how far is it mistaken?

That the State gives to *some* corporations important powers which it gives only to corporations, is an obvious fact. The power to build and operate a railroad for public use and the incidental power to condemn private property for railroad purposes are powers which exist only by grant of the State and which the State grants only to corporations. That such powers are granted only to corporations is matter of fact only. In the nature of things they might be granted to natural persons. Grants to individuals of the similar power of maintaining and operating ferries were common in earlier days; and railroad franchises have, I think, been granted to individuals without incorporation. But for reasons of convenience, not of necessity, it has become the uniform practice to grant such franchises only to persons associated together as bodies corporate. Some corporations, then, do enjoy important powers which only such corporations enjoy; and these powers are given to them by the State. To this extent the common belief is well founded. But it will not do to jump to the conclusion that the same thing is true as to all corporations.

Franchises which corporations enjoy are of two kinds: there is the franchise of corporate being and there are such franchises as that of operating a railroad. The franchise of corporate being may, in the language of fiction, be said to be enjoyed by every corporation, in the same sense in which the breath of life is enjoyed by a natural person—upon it the corporate life depends. The franchise of operating railroads, turnpikes, ferries and the like, sometimes called operative franchises, are exercised only by those corporations to which they are given. The franchise of corporate being is the only franchise which all corporations enjoy. If we would generalize as to all corporations, therefore, we must put out of consideration the operative franchises and the corporations which enjoy them, and study the franchise of corporate being alone. We must ask: What does the mere grant of the franchise of corporate being amount to? or, in other words: What is obtained by incorporation? Does it give power?

As the biologist takes the simplest forms of animal life for his studies, so we may best take the simplest kinds of corporations in seeking to find how far mere incorporation gives power. Take the case of a small partnership of the ordinary kind doing a grocery business, which it is proposed to change into a corporation. The partnership, let it be supposed, is composed of three men. They are associated together in business as a firm. They propose to be incorporated and continue in business associated together as a corporation. What gain of power will there be? So long as they admit no others into the association, there will be no gain of power whatever. The financial strength of the corporation will certainly be no greater than that of the partnership; since all the assets of all the partners are back of the credit of the partnership, and only so much as they elect to put in as capital will be back of the credit of the corporation. The corporation can do no business which the partnership could not have done. The powers of the corporation may be broad or narrow; but they cannot be any broader than the powers of the partnership. The partnership could engage in any lawful business according to the will of the partners. The field of operations of the corporation may perhaps be made equally broad; but it cannot be made any broader. So far as concerns the power to do business, or the kinds of business which may be done, incorporation usually results in a limitation; never in an extension of power. So it is fairly correct to say that the incorporation of a given body of persons adds no power whatever. Such body of persons by mere incorporation gain nothing in the way of power; but as a rule subjects itself to limitations.

The phrase *ultra vires* suggests that incorporation creates or grants powers. Its use springs from the fiction that by incorporation an artificial person is created. It really refers, not to powers, but to limitations. The business which may be done by a partnership is unlimited within the field of business which is lawful. The three partners in the grocery business may extend their operations to cover any lawful business. No lawful business can be *ultra vires* as to them. But when they become incorporated, they must define their field of business. The field may be broad or narrow, but it must be fixed, and, as a corporation, they cannot go outside of it. The definition of the field limits their operations. The statement of the powers of the corporation operates simply as a limitation. In the language of fiction, it is said that the artificial person has such and such powers, and no others; but this means only that

it cannot go beyond certain bounds; in other words, that the association when incorporated is subject to a limitation which does not rest upon it while it is unincorporated. Doubtless the use of this phrase and other phrases based upon the legal fiction is responsible in part for the common notion that incorporation in and by itself gives power. But fiction is not fact. Incorporation in and by itself gives no power.

In a peculiar way incorporation in this country involves a limitation. If our three grocers incorporate themselves, they must do so under the laws of one of the States. If they are citizens of that State, then as partners they are entitled to all privileges and immunities of citizens in the several States. But they are not so entitled as a corporation. Citizens of one State cannot be barred from carrying on any lawful business in any other State, but corporations of one State can as a rule do business in other States only with their consent.

Incorporation subjects an association to special State control and regulation; and in this way operates to limit rather than extend its powers.

To pass from small things to large, the association of persons which was incorporated under the name of the Northern Securities Company did not do, nor plan to do, anything which it could not have done quite as well if it had not been incorporated. If its plan had been successful against attack under the anti-trust act, it would have owed its success in no degree to the fact that the association was incorporated rather than unincorporated. Its power to do what was intended, if that had been lawful, would have been quite as ample without its New Jersey charter; that is, if the association had rested on agreement only, without incorporation. Incorporation added nothing to its power.

And yet corporations have been important agencies in industrial and commercial progress. The business of the world is for the most part under corporate control. What is the reason? It is because the formation of corporations often, but not always, brings about a combination of capital and energies. Incorporation creates powers only indirectly and only so far as it induces such combination of capital and energies. In the case supposed above, no power is created simply by the change from partnership to corporation. But if it is proposed to extend the business, to increase the capital and take in new members, then incorporation may play an important part. New members may be willing to come in who

would not come into the partnership, because (with unimportant exceptions) in a partnership the liability of members for debts is unlimited, while in a corporation only that which the members contribute to the capital is at risk. That is the sum and substance of the matter. Incorporation gives to an association of persons the privilege of doing business without responsibility of the members for the acts or omissions of the association, the association being personified in law and regarded as distinct from the individuals composing it. If this privilege induces combination of capital and energies, in that way, and in that way only, incorporation develops power.

Turn again to the case of the Northern Securities Company. That was intended to be merely a holder of stocks of two railroad companies, and possibly of other stocks. It was not intended that it should do any active business or incur debts to any large amount; and if it had been organized by agreement merely, without incorporation, the possibility of its becoming indebted could easily have been limited. Hence it was a matter of indifference whether the associates were or were not freed from liability for debts; and for this reason incorporation, which merely gave such freedom, could not reasonably have been an inducement to participation in the association. The combination created the power; and incorporation, not having induced the combination, cannot be said to have given the power, either directly or indirectly.

In every case where a cash business is to be done or where obligations to be incurred are surely limited so as always to be small in comparison with the value of the assets, while there may be power produced by combination, such power cannot be said to be produced, even indirectly, by incorporation, since without it all that is essential can be accomplished.

There are to-day a number of combinations of magnitude which are organized by agreement only and are not incorporated. Incorporation would not increase their power. And there are many associations which have been organized as corporations merely for convenience, and have no substantial advantage from incorporation.

Turn back, in conclusion, to the corporations which are given operative franchises, such as railroad companies. Confusion of thought is occasioned by the fact that usually the same acts, or acts done at the same time, secure the franchise of corporate being and the operative franchise; or, in other words, create the corpora-

tion and give to that corporation its operative franchise. This is so only as matter of fact. The law might provide separately for the incorporation of a railroad company and the acquisition by such company of the right to build and operate a railroad, together with the right of exercising in the stead of the State the power of eminent domain. Since the establishment of railroad commissions, this is substantially the case in some States. But whatever form the statutes take, these two separate things are always involved in the organization of a railroad company and securing for it the right to build and operate a railroad. The grant of the operative franchises undoubtedly creates power, or rather delegates power which belongs to the State. The grant of this power is the basis of a special right of regulation by the State which is the grantor. But as to these corporations, as well as all corporations to which no such grants are made, the grant of the franchise of corporate being, or mere incorporation, in and by itself creates no power. An association, whether it is or is not the grantee of special franchises such as those given to railroad companies, gains no power by mere incorporation. It is only indirectly by inducing participation in the association and so bringing about combination of capital or energies, that incorporation can be said in any sense to create power; and where the business is such that incorporation is not a reasonable inducement to participation, incorporation cannot properly be said to create power in any sense.

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